

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

STATE OF DELAWARE

v.

KEVIN A. ROY,

Defendant.

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I.D. No. 0503015173

Submitted: June 3, 2019

Decided: June 17, 2019

*Upon Defendant's Motion for Correction of Sentence*

**DENIED.**

**ORDER**

Kevin A. Roy, *pro se*, Smyrna, DE.

Cari A. Chapman, Esquire, Deputy Attorney General, Department of Justice, 820  
N. French St., Wilmington, Delaware, Attorney for the State.

**WHARTON, J.**

This 17th day of June, 2019, upon consideration of Defendant's Motion for Correction of Sentence and the record in this matter, it appears to the Court that:

1. Defendant Kevin A. Roy ("Roy") was indicted by the Grand Jury on the charges of Murder First Degree, Possession of a Firearm During the Commission of a Felony ("PFDCF") (two counts), Possession of a Deadly Weapon by a Person Prohibited ("PDWBPP"), Attempted Delivery of Cocaine and Conspiracy Second Degree.<sup>1</sup> On February 6, 2006, Roy pled guilty to Manslaughter and one count of PFDCF.<sup>2</sup> He was sentenced to a total of 35 years of incarceration suspended after 30 years of incarceration, followed by decreasing levels of supervision.<sup>3</sup> Roy's 2008 appeal from the Court's 2006 sentencing order was dismissed as untimely.<sup>4</sup>

2. Roy has filed three Motions for Postconviction Relief ("PCR"), all of which were either denied or summarily dismissed.

3. Roy filed this Motion for Correction of Sentence on June 3, 2019.<sup>5</sup> The motion alleges that in imposing a 10 year mandatory sentence for PFDCF the sentencing judge improperly considered his juvenile adjudication of robbery to enhance his sentence in violation of his rights under the 8<sup>th</sup> and 14<sup>th</sup> Amendments

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<sup>1</sup> D.I. 2.

<sup>2</sup> D.I. 28.

<sup>3</sup> D.I. 29.

<sup>4</sup> *See Roy v. State*, 945 A.2d 1168 (Del. 2008) (TABLE).

<sup>5</sup> D.I. 99.

because he was not convicted in a criminal proceeding of robbery, but, rather, was adjudicated delinquent in a Family Court civil proceeding.<sup>6</sup>

4. Pursuant to Superior Court Criminal Rule 35(a), “The Court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.” The time period for requesting a reduction of sentence is 90 days after sentence is imposed.<sup>7</sup> The Court treats this motion as one alleging an illegal sentence since it alleges a constitutional violation and is otherwise outside of the time limit for requesting a reduction of sentence. “Relief under Rule 35(a) is available ‘when the sentence imposed exceeds the statutorily-authorized limits, [or] violates the Double Jeopardy Clause...’”<sup>8</sup> A sentence may also be illegal if it is ambiguous as to the time and manner in which it is to be served, internally contradictory, lacks a statutorily required term, is uncertain as to its substance, or is not one which the judgment of conviction authorizes.<sup>9</sup>

5. Roy alleges that SENTAC guidelines prohibited the sentencing judge from enhancing his sentence based on his juvenile adjudication. He argues that, not only was this enhancement improper, but it violated his due process rights. Roy also alleges that the judge who sentenced him was limited to considering only criminal

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<sup>6</sup> *Id.*

<sup>7</sup> Super. Ct. Crim. R. 35(b).

<sup>8</sup> *Brittingham v. State*, 705 A.2d 577, 578 (Del. 1998), quoting *United States v. Pavlico*, 961 F.2d 440, 443 (4<sup>th</sup> Cir. 1992).

<sup>9</sup> *Id.*

acts that would have subjected him to prosecution in the Superior Court, and not his juvenile adjudication of delinquency.

6. In the context of Roy's motion, it is helpful to understand what an "enhanced" sentence is and what a "mandatory" sentence is. As the Court understands Roy's motion, he alleges that his sentence was "enhanced" in that it exceeded the SENTAC recommended sentence. A sentence imposed for PFDCF is not subject to suspension, nor is someone sentenced for PFDCF eligible for good time, parole, or probation.<sup>10</sup> In that sense, any sentence for PFDCF is "mandatory."<sup>11</sup> But not all such sentences are "minimum mandatory" sentences. There is a three year "minimum" sentence for any violation of 11 *Del. C.* § 1447A,<sup>12</sup> and a five year "minimum" sentence for defendants who have been twice previously convicted of a felony.<sup>13</sup> Those sentences are then "minimum mandatory" sentences. Thus, Roy's 10-year sentence for PFDCF is a "mandatory" sentence, but not a "minimum mandatory" sentence.<sup>14</sup> While he claims that the sentencing judge improperly considered his juvenile adjudication of delinquency to "enhance" his sentence above SENTAC guidelines, he does not claim that the sentencing judge considered that adjudication to impose a statutorily mandated "enhanced" minimum mandatory sentence.

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<sup>10</sup> 11 *Del. C.* § 1447A(d).

<sup>11</sup> *See* 11 *Del. C.* § 4204(d).

<sup>12</sup> 11 *Del. C.* § 1447A(b).

<sup>13</sup> 11 *Del. C.* § 1447A(c).

<sup>14</sup> D.I. 29.

7. Turning to the motion, Roy's 10 year sentence on the PFDCF charge is clearly within the permissible sentencing range of three to twenty-five years.<sup>15</sup> Accordingly, it is not an illegal sentence subject to correction.<sup>16</sup> Further, Roy misunderstands the force of the SENTAC guidelines. Citing *Siple v. State*,<sup>17</sup> the SENTAC Benchbook states, "However, it should be noted that Delaware's sentencing guidelines are voluntary, non-binding, and as such, in the absence of constitutional violations, are not generally subject to appeal."<sup>18</sup> Thus, Roy's argument that the SENTAC guidelines prohibited an enhancement of his sentence outside of the guidelines is without merit. Finally, there is no constitutional or other legal bar to the sentencing judge considering the behavior that resulted in Roy's adjudication of delinquency for robbery in determining an appropriate sentence in this case.

**THEREFORE**, Roy's Motion for Correction of Sentence is **DENIED**.

**IT IS SO ORDERED.**

oc: Prothonotary  
cc: Investigative Services

  
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Ferris W. Wharton, J.

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<sup>15</sup> See 11 Del. C. §§ 1447A, 4205(b)(2).

<sup>16</sup> See *Brittingham* at 578.

<sup>17</sup> 701 A.2d 79, 82-83 (Del. 1997).

<sup>18</sup> SENTAC Benchbook 2019, at 22.